

Transgender parenting and the law: we must be creative with legislation to cater for parents who do not fit neatly with the traditional family model.

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The UK's laws surrounding parenthood are no longer fit for purpose and do not cater for questions on gender, assisted reproduction and legal parenthood. Rightful parents risk ending up in a precarious legal situation if we do not abandon law's traditional interpretations of parenthood, argues [Julie McCandless](#).



In April 2008 Thomas Beatie's personal account about being pregnant and carrying a child for him and his wife was published in [The Advocate](#) magazine alongside a photograph of him sporting both a five-month pregnant belly and a beard. While transgender reproduction is nothing new, what distinguished Thomas was that he was reported as being the first legal (and married) man on record to give birth. Born biologically female, Thomas underwent gender transition – by taking male hormones and having a double mastectomy – and was legally re-registered as male on his birth certificate. Like many transgender men, he did not undergo genital reassignment surgery or have his female reproductive capacity removed. As his wife Nancy was unable to have children due to a medical hysterectomy, when they decided to start a family, Thomas “used [his] female reproductive organs to become a father”. Thomas and Nancy have since had two more children.

While Thomas self-identifies as his children's father, and Nancy as their mother, the question of whether they are a father and mother in the legal sense is much more complex, given that motherhood is traditionally grounded in gestation and fatherhood in either the genetic connection and/or the man's relationship with the child's mother. Although the details of precisely how Thomas and Nancy were recorded as legal parents on their children's birth certificates in the United States has not been revealed, it may be that they were registered as ‘parent’ and ‘parent’, rather than as ‘mother’ and ‘father’. In the UK, adoption certificates have long used the gender-neutral terminology of ‘parent’ in place of ‘mother’ and ‘father’, as has traditionally appeared on birth certificates.

The [Human Fertilisation and Embryology Act 2008](#) has changed this slightly, by permitting two women to be registered as the legal parents of a child from the moment of birth (as opposed to adoption at a later stage by two female parents). The woman giving birth to the child will be recorded as ‘mother’ on the birth certificate – indeed, only women who give birth may be recognised as legal mothers – with the second female parent recorded as ‘parent’. This includes whether or not she is the genetic mother. The 2008 legislation, like the original 1990 Act of the same name, also provides for the conferral of legal fatherhood to the mother's husband or male partner when donated sperm has been used to conceive a child.

Does this mean that if Thomas had given birth in the UK following donor insemination, he would be recorded as the legal mother? Possibly, but possibly not: although Thomas has given birth, he is no longer legally recognised as a woman and the wording in the legislation specifies that the status of legal mother is granted to “the woman” who gives birth. Likewise, it is unclear how status would be conferred on Nancy: legal motherhood is reserved for women who give birth, while female parenthood is contingent on a woman being in a civil partnership (not a heterosexual marriage) with the legal mother, or meeting the ‘agreed parenthood’ conditions in the legislation, which likewise form around the female parent's relationship with the legal mother and her fertility treatment. If Thomas is not considered to be the legal mother, does Nancy's claim to parental status also fail? Would they therefore have to adopt their own child –and incur considerable state scrutiny in the process –in order to be recognised as legal parents?

This example of transgender parenthood very vividly teases out how our ideas about law, gender and parenthood are not as straightforward as we might intuitively believe. While the law in its current form may ‘make sense’ for the vast majority of people, it does not really grapple with the fundamental question of *what* makes someone a parent and *why*. Is it a person's intent to become a parent? Is it their bio-genetic relationship with the child? Is it an inevitable mixture of a number of factors? Is being a ‘mother’ different from being a ‘father’, or indeed a ‘parent’? Who should decide? The current law sends mixed messages on a number of these questions. However, what does seem clear is that in the context of assisted reproduction our legislators have very deliberately sought to reserve the right of law to prescribe who is entitled to parental status. This may be justified in the interests of legal certainty, but only if the legal framework is

deemed fair and fit for purpose.

The transgender parenthood example highlights a number of existing problems and it is not difficult to imagine further situations where the framework will prove inadequate. For example, the emphatic grounding of motherhood in gestation and the prohibition of legal motherhood or indeed female parenthood on the basis of the genetic link means that a woman who 'donates' her eggs to another woman who has agreed to act as a surrogate, has no direct claim to parental status on the basis of her genetic link. Instead, she must apply for a parental order for legal parenthood to be transferred. While this provides some protection for a surrogate mother who changes her mind about relinquishing parenthood once the child is born, it also arguably leaves an agreeable surrogate in a difficult legal situation if the commissioning parent(s) change their mind. Moreover, it puts the genetic mother in a fairly precarious legal situation. Only couples can apply for a parental order, so if the genetic mother and her partner were to separate (or her partner to die) before the birth of the child or the award of the parental order, she would have to adopt her own genetic child. Social and adoption services may well be sympathetic to such an adoption application, but the outcome is difficult to predict, especially if the surrogate (and legal) mother raises objections to the child being adopted by a single person rather than a couple. While single persons have been allowed to adopt a child in the UK since the 1970s, being single is not a protected status in equality and anti-discrimination law. Any 'right' of the genetic mother to adopt the child in question, therefore, cannot be guaranteed.

While this example of surrogacy, like transgender parenthood, may seem to relate to only a small proportion of births in the UK, it too raises fundamental questions about law, gender and parenthood. In the 2008 Act, there was a clear 'rolling out' from the heterosexual model of parenthood to incorporate same-sex female parenthood. However, that the law explicitly prohibits female genetic parenthood demonstrates the limits of this 'rolling out' in two ways. First, although the genetic connections are muted for both formal sperm and egg donors, the legislation does not seek to explicitly silence the male genetic connection in contexts beyond donation. This demonstrates the gendering by law of even the relatively symmetrical biological contribution of genetic material to reproduction. Second, to formally acknowledge genetic motherhood would seem to risk opening the door to three-parent claims to legal parenthood, in light of the recognition of non-genetic fathers and female parents on the basis of their relationship with the legal mother (as husband, civil partner or 'agreed parent').

In other words, if we allow two women to claim parenthood based on respective genetic and gestational ties, might a third claim parenthood because they are married or in a civil partnership with the legal mother (under the terms of the legislation)? Of course, something similar could happen with a genetic father and the legislation is explicit that a child may have only one legal father (but interestingly it does not prohibit genetic fatherhood completely). Indeed, while two men can now apply for a parental order, they may not avail of the status provisions from the moment of the child's birth, as this would mean either not recognising the birth mother as a legal parent, or recognising three (or more) parents at birth.

What we therefore seem to see in the Human Fertilisation and Embryology Act 2008 is a rather complicated reinforcement of deep-seated ideas about what a family *should* look like. Rather than tackling the more crucial question of why we confer parental status in the first place, who should have it and whether it needs to be gendered, the traditional legal fault-lines relating to marriage and bio-genetic ties have been 'stretched' in order to assimilate the family forms that emerge from assisted reproductive practices which 'confuse' our typical understandings of gender, (hetero) sexuality and bio-genetic kinship. Key to this stretching is the insistence that a child can have no more than two legal parents and that the two parents play 'different' legal roles (i.e. one mother and one father/or female parent, but not two mothers, two fathers or even two parents). Same-sex and other 'new' types of parenthood are not recognised on their own terms, but instead are assimilated into the traditional family model. But how far can this model stretch and is it time for family law and policy-makers to think more creatively about how we legally regulate our most intimate of relations?

The rigid nature of this new legislation means that if a particular reproductive scenario does not neatly fit with the legislative framework there is little – if any – room for legal discretion in pleas to the courts to resolve difficulties and uncertainties relating to parental status. I have here suggested a couple of problematic scenarios and we can certainly think of more, not least mistaken egg fertilisation and/or embryo implantation cases. While certain aspects of the legislation are to be commended, what has been passed in relation to parenthood is far from "future-proofed". This shortcoming is in part due to the Human Fertilisation and Embryology Act 2008 being an amending statute. However, it remains the case that parental status will be beyond the reach of some of the most marginalised 'parents' in our society.

[Read research highlights](#) from Julie McCandless' study "Who's the Daddy?".

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